INDEX

PAGE

SUBJECT INDEX

Petition for Writ of Certiorari 1

Opinion Below 2

Jurisdiction 2

Questions Presented 3

A. Whether in a prosecution for alleged sales of narcotics in violation of 26 U. S. C., Sec. 2554(a), where evidence developed by cross-examination of witnesses for the Government showed that the defendant (petitioner) had been wrongfully entrapped into making the alleged sales, or was susceptible to an inference of entrapment and justified submission of that issue to the jury, the error of the trial court in deciding the issue of entrapment against the accused (petitioner) as a matter of law was such a plain error as should be noticed under Rule 52(b) of the Federal Rules of Criminal Procedure, notwithstanding the fact that exception was not taken to the erroneous instruction in compliance with Rule 30 of the Federal Rules of Criminal Procedure where defendant's (petitioner's) counsel made a demurrer to the Government's evidence or a motion for acquittal as provided by Rule 29 of the Federal Rules of Criminal Procedure, on the ground that the Government's evidence showed that if the defendant had committed either offense of which he was charged, it was by reason of entrapment by agents of the Government, and whether by reason of such error in the instructions, the petitioner should have a new trial? 3-4

INDEX CONTINUED

PAGE

B. Whether under the facts developed by cross-examination of Government's witnesses it was shown that the defendant (petitioner) had been entrapped, and whether the trial court erred in overruling the defendant's (petitioner's) demurrer to the Government's evidence or motion for acquittal? 4

C. Whether the indictment under which petitioner was convicted was sufficient to charge an offense in violation of Section 2554(a) of Title 26, U. S. Code? 4

Summary Statement of Matters Involved 4

Reasons Relied Upon for Issuance of Writ 7

Specifications of Error 8

Brief in Support of Petition for Writ of Certiorari 10

I. Opinion of the Court Below 10

II. Jurisdiction 10

III. Statement of the Case 14

IV. Specifications of Error 18

V. Argument 19

First Proposition: The Court of Appeals erred in holding that the error of the trial court in not submitting the issue of entrapment to the jury and in instructing the jury as a matter of law that there was no entrapment in the case was not a plain error for which the judgment of the trial court should be reversed, and erred in not reversing the judgment of the trial court because of the error of the trial court in misdirecting the jury on the law of the case, and in deciding the issue of entrapment against the petitioner as a

BLEED THROUGH – POOR COPY

INDEX CONTINUED

PAGE

matter of law, when it should have been submitted to the jury as a question of fact 19

Second Proposition: The Court of Appeals erred in denying Petitioner's Petition for Rehearing 24

Third Proposition: The Court of Appeals erred in holding that the indictment was sufficient 25

Fourth Proposition: The Court of Appeals erred in not holding that the Demurrer to the Government's evidence should have been sustained 26

Conclusion 26

Appendix follows brief.

AUTHORITIES

CASES:

Butts v. United States (C. C. A. 8), 273 Fed. 35, 18 A. L. R. 143 20

Bogileno v. United States, 38 Fed. (2d) 584 ..... 13, 21

Brasfield v. United States, 272 U. S. 448, 450, 71 L. Ed. 345, 47 Sup. Ct. 135 12

Chin Gum v. U. S., 150 Fed. (2d) 765 ..... 2, 11

Clyatt v. United States, 197 U. S. 207, 221, 49 L. Ed. 726, 25 Sup. Ct. 429 ..... 12, 23

Cromer v. United States, 142 Fed. (2d) 697 25

DiSalvo v. United States, 2 Fed. (2d) 222 20

Gypsy Oil Co. v. Escoe, 275 U. S. 498, 72 L. Ed. 393, 48 Sup. Ct. 112 ..... 2, 11

Hunter v. United States (C. C. A. Tex.), 62 Fed. (2d) 217 20

Johnson v. United States, 318 U. S. 189, 87 L. Ed. 704, 63 Sup. Ct. 549 12

Kinard v. United States, 68 App. D. C. 250, 96 Fed. (2d) 522 13

INDEX CONTINUED

PAGE

Madsen v. United States, 165 Fed. (2d) 507 13
Marin v. United States (C. C. Mich. 1926), 10 Fed. (2d) 271 22
Meadows v. United States, 65 App. D. C. 275, 82 Fed. (2d) 891 ..... 13, 23
Morse v. U. S., 270 U. S. 151, 70 L. Ed. 518, 56 Sup. Ct. 241 ..... 2, 11

Nailling v. United States, 142 Fed. (2d) 551 25
National Labor Relations Board v. Mackay Radio & Tele. Co., 304 U. S. 33, 82 L. Ed. 1381, 58 Sup. Ct. 904 ..... 2, 12

Screws v. United States, 325 U. S. 91, 107, 89 L. Ed. 1495, 65 Sup. Ct. 1031 ..... 12, 22
Sorrells v. United States, 287 U. S. 435, 77 L. Ed. 413, 53 Sup. Ct. 210, 86 A. L. R. 249 20
Strader v. United States, 72 Fed. (2d) 589 13
Sutton v. United States, 157 Fed. (2d) 661 25

United Brotherhood of Carpenters and Joiners of America v. United States, 330 U. S. 395, 412, 91 L. Ed. 973, 67 Sup. Ct. 775 ..... 12, 24
United States v. Atkinson, 297 U. S. 157, 159, 80 L. Ed. 555, 56 Sup. Ct. 391 12
U. S. v. Seminole Nation, 299 U. S. 417, 81 L. Ed. 316, 57 Sup. Ct. 283 ..... 2, 11
United States v. Wilson (C. C. A. 2), 154 Fed. (2d) 802 24

Wall v. United States (C. C. A. Fla.), 65 Fed. (2d) 993 20
Wiborg v. United States, 163 U. S. 632, 658, 41 L. Ed. 290, 298, 16 Sup. Ct. 1127, 1197 ..... 13, 23
Williams v. United States (C. C. A. 8), 158 Fed. 30, 35, 88 C. C. A. 296 13

MISCELLANEOUS:

Federal Rules of Criminal Procedure, Rule 37(b) 2, 11
Title 26, U. S. Code, Sec. 2554(a) 3, 4, 8, 18
Judicial Code (28 U. S. C., Sec. 1254) 2, 10

BLEED THROUGH – POOR COPY

No. ——

Supreme Court of the United States

(October Term, 1948)

Oliver Cleve Ryles,
Petitioner,

VERSUS

United States of America,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION FOR WRIT OF CERTIORARI

The petitioner, Oliver Cleve Ryles, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in that certain case therein entitled, "Oliver Cleve Ryles, Appellant, vs. United States of America, Appellee," the same being numbered 3711 therein. The judgment of that court was entered on December 29, 1948, but within thirty days thereafter, and within the time allowed by the United States Court of Appeals, the petitioner filed in that court a petition for rehearing, as permitted by the rules of that court, and such petition for rehearing was denied by the Court of Appeals on January 27, 1948. The decision has not yet been reported, but is shown in the printed transcript of record filed herewith.

OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit is set forth in the record and is copied in the appendix to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1254 of the 1948 Judicial Code (28 U. S. C., Sec. 1254), and Rule 37(b) of the Federal Rules of Criminal Procedure.

This petition for writ of certiorari is filed within thirty days after the entry of the order of the United States Court of Appeals for the Tenth Circuit denying petitioner's petition for rehearing in that court, which was filed within the time a petition for writ of certiorari could have been filed in this Court to obtain a review of the judgment entered by that court on December 29, 1948, and is, it is submitted, filed within the time allowed by Rule 37(b) of the Federal Rules of Criminal Procedure.

—*Chin Gum* v. *U. S.*, 150 Fed. (2d) 765;

Morse v. *U. S.*, 270 U. S. 151, 70 L. Ed. 518, 56 Sup. Ct. 241;

Gypsy Oil Co. v. *Escoe*, 275 U. S. 498, 72 L. Ed. 393, 48 Sup. Ct. 112;

U. S. v. *Seminole Nation*, 299 U. S. 417, 81 L. Ed. 316, 57 Sup. Ct. 283;

National Labor Relations Board v. *Mackay Radio & Tele. Co.*, 304 U. S. 33, 82 L. Ed. 1381, 58 Sup. Ct. 904.

BLEED THROUGH – POOR COPY

This petition is to obtain a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, dated December 29, 1948, and also the order of that court made on January 27, 1949, denying this petitioner's petition for rehearing in that court. This petition is made pursuant to Section 5(b) of Rule 38 of the Rules of this Court, and in particular the part thereof which indicates that a writ of certiorari may issue to a United States Court of Appeals where a United States Court of Appeals has decided an important question of Federal Law which has not been, but should be, settled by this Court, or has decided a federal question in a way probably in conflict with applicable decisions of this Court.

QUESTIONS PRESENTED

A.

Whether in a prosecution for alleged sales of narcotics in violation of 26 U. S. C., Sec. 2554(a), where evidence developed by cross-examination of witnesses for the Government showed that the defendant (petitioner) had been wrongfully entrapped into making the alleged sales, or was susceptible to an inference of entrapment and justified submission of that issue to the jury, the error of the trial court in deciding the issue of entrapment against the accused (petitioner) as a matter of law was such a plain error as should be noticed under Rule 52(b) of the Federal Rules of Criminal Procedure, notwithstanding the fact that exception was not taken to the erroneous instruction in compliance with Rule 30 of the Federal Rules of Criminal Procedure where defendant's (petitioner's) counsel made a demurrer to the Government's evidence

or a motion for acquittal as provided by Rule 29 of the Federal Rules of Criminal Procedure, on the ground that the Government's evidence showed that if the defendant had committed either offense of which he was charged, it was by reason of entrapment by agents of the Government, and whether by reason of such error in the instructions, the petitioner should have a new trial?

B.

Whether under the facts developed by cross-examination of Government's witnesses it was shown that the defendant (petitioner) had been entrapped, and whether the trial court erred in overruling the defendant's (petitioner's) demurrer to the Government's evidence or motion for acquittal?

C.

Whether the indictment under which petitioner was convicted was sufficient to charge an offense in violation of Section 2554(a) of Title 26, U. S. Code?

SUMMARY STATEMENT OF MATTERS INVOLVED

Petitioner was charged by indictment in the United States District Court for the Eastern District of Oklahoma in two counts, each attempting to charge a sale of narcotics in violation of Section 2554(a) of Title 26, U. S. Code (R. 1). The indictment charged in the first count that petitioner sold to one Darrell Herbert Brown 3/16ths of an ounce

BLEED THROUGH – POOR COPY

of deodorized tincture of opium on or about August 18, 1947, for the sum of $7.00, and in the second count that petitioner sold to Brown on or about August 20, 1947, four one-quarter grain tablets of morphine, a derivative of opium, for the sum of $9.00, and each count alleged that the alleged sale was made "not in pursuance of a written order of the said Darrell Herbert Brown upon a form prescribed and furnished by the *Collector* of Internal Revenue, and not within any of the exemptions or exceptions provided by law."

Petitioner will be referred to herein and in the brief in support of this petition as the defendant.

After a trial with a jury, verdict was returned finding the defendant guilty of each count, and the court sentenced the defendant to be confined for three years on each count, such sentences to run concurrently (R. 1-4). Petitioner appealed from the judgment and sentence to the United States Court of Appeals for the Tenth Circuit, which affirmed the judgment.

The defendant pleaded not guilty (R. 2). The verdict was returned March 17, 1948 (R. 2). The defendant filed a motion for new trial and in arrest of judgment which was overruled April 5, 1948 (R. 2, 4), and was sentenced April 26, 1948 (R. 4). He has been at liberty since then on a bond allowed by the trial judge (R. 6).

At the trial (R. 6), the Government produced four witnesses, including the said Darrell Herbert Brown (R. 16), the person to whom it was alleged defendant made the sales of narcotics, and the defendant did not introduce any evidence and demurred to the Government's evidence

(R. 27). The court overruled such demurrer or motion for acquittal (R. 27). The defendant claimed that the Government's evidence showed that if the defendant had committed either of the offenses of which he was charged, it was by reason of entrapment by Government agents (R. 27). The court, in effect, instructed the jury that the court was deciding as a matter of law that there was no entrapment, and that the only thing for the jury to decide was whether the defendant made the alleged sales to the witness, Brown (R. 30).

Petitioner contends that the evidence introduced showed that if either offense was committed it was because defendant was entrapped, and further contends that if such evidence does not conclusively show that there was such entrapment that it at least raised a jury question as to whether or not the defendant was entrapped.

The evidence showed that Darrell Herber' Brown was a paid informer who was acting as a Government agent (R. 11); that he was a narcotic addict (R. 19); that he had known the petitioner and was with him almost every day for two or three weeks; that he persuaded the defendant to make the two alleged sales of narcotics to him charged in this case (R. 22); that he insisted on it (R. 22); that if it had not been for such insistence, he never would have been able to purchase the narcotics from or through the defendant (R. 22); that as far as was known to witness, Brown, the petitioner never would have committed any offense or done anything against the law if it had not been for the activities by such witness, and the Government agent who employed Brown (R. 22). Other facts are set

BLEED THROUGH – POOR COPY

forth in the opinion of the Court of Appeals, a copy of which is attached as an appendix to this petition and in the supporting brief filed herewith.

REASONS RELIED UPON FOR ISSUANCE OF WRIT

1. The questions involved are questions of Federal law which have not been, but should be, settled by this Court. Such questions include the question of construction of Rules 30 and 52(b) of the new Federal Rules of Criminal Procedure as to whether, if the facts developed in the trial of a criminal case raised a jury question as to whether the defendant had been entrapped, the error of the trial court in deciding the issue against the defendant as one of law and not submitting it to the jury, is such a plain error under Rule 52(b) of the Federal Rules of Criminal Procedure, that the judgment of the trial court should be reversed and a new trial ordered, although the requirements of Rule 30 of the Federal Rules of Criminal Procedure in regard to exceptions to instructions were not complied with by the defendant's counsel, where the liberty of the defendant is at stake by reason of such error of the trial court.

2. The decision of the United States Court of Appeals for the Tenth Circuit in this case is probably in conflict with applicable decisions of this Court cited and discussed in the brief filed herewith as to the power and duty of an appellate court to correct a plain error in the trial of a criminal case involving the liberty of an accused, although the action of the trial court was not particularly excepted to at that time.

3. The decision of the United States Court of Appeals for the Tenth Circuit in this case is probably in conflict with prior decisions of that court (rendered before the adoption of the Federal Rules of Criminal Procedure), cited in the brief filed herewith, as to the power and duty of an appellate court to correct a plain error clearly prejudicial to the accused in the trial of a criminal case in the absence of a particular exception in the trial court, and it is important that this Court determine the correct view to be adopted under such new Rules of Criminal Procedure in regard to this matter.

SPECIFICATIONS OF ERROR

1. The Court of Appeals erred in holding that the error of the trial court in not submitting the issue of entrapment to the jury and in instructing the jury as a matter of law that there was no entrapment in the case was not a plain error for which the judgment of the trial court should be reversed.

2. The Court of Appeals erred in not reversing the judgment of the trial court because of the error of the trial court in misdirecting the jury on the law of the case and in deciding the issue of entrapment against petitioner as a matter of law, when it should have been submitted to the jury as a question of fact.

3. The Court of Appeals erred in holding that the indictment under which petitioner was convicted was sufficient to charge a violation of the statute [26 U. S. C., Sec. 2554(a)].

BLEED THROUGH – POOR COPY

4. The Court of Appeals erred in not reversing the judgment of the District Court with directions to grant petitioner, the defendant in the District Court, a new trial.

5. The Court of Appeals erred in not holding that the defendant's demurrer to the Government's evidence or motion for acquittal should have been sustained by the District Court.

6. The Court of Appeals erred in denying petitioner's petition for rehearing in that court.

WHEREFORE, Your petitioner respectfully prays that a writ of certiorari issue out of this Court directed to the United States Court of Appeals for the Tenth Circuit, requiring that said court send to this Court a complete transcript of the record in that court in case No. 3711 therein, entitled "Oliver Cleve Ryles, Appellant, vs. United States of America, Appellee," and that the decision and judgment of said Court of Appeals be reviewed by this Honorable Court, and that the judgment of said Court of Appeals be reversed, and for such other and further relief as this Court may deem proper.

JAMES W. BOUNDS,
Hugo, Oklahoma,
Counsel for Petitioner.

Of Counsel:

TURNER M. KING,

CARLOSS WADLINGTON,
Ada, Oklahoma.

No. ——

Supreme Court of the United States
(October Term, 1948)

Oliver Cleve Ryles,
Petitioner,

VERSUS

United States of America,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF THE COURT BELOW

The opinion of the Court of Appeals for the Tenth Circuit in this case has not been reported but is included in the record and a copy of the same is attached to the petition for writ of certiorari and this brief in support thereof as an appendix. The District Court did not write an opinion.

II.

JURISDICTION

1. The jurisdiction of this Court is invoked under Section 1254 of the 1948 Judicial Code (28 U. S. C., Sec.

BLEED THROUGH – POOR COPY

1254), and Rule 37(b) of the Federal Rules of Criminal Procedure.

2. The petition for writ of certiorari is to obtain a review of the judgment and opinion of the Court of Appeals for the Tenth Circuit, dated December 29, 1948, and the order of that court entered on January 27, 1949, denying this petitioner's petition for rehearing in that court, such petition for rehearing having been permitted by the rules of that court, and having been filed within thirty days after the date of the entry of the judgment of that court affirming the judgment and sentence of the United States District Court for the Eastern District of Oklahoma. The petitioner submits that, inasmuch as his petition for rehearing was filed in the Court of Appeals within thirty days after the entry of the judgment of that court, and within the time a petition for a writ of certiorari to review the judgment of that court could have been filed in this Court if no petition for rehearing had been filed in the Court of Appeals, that the period of thirty days prescribed by Rule 37(b) of the Federal Rules of Criminal Procedure for filing a petition for a writ of certiorari in this Court to obtain a review of the judgment of the Court of Appeals did not commence to run until that court made and entered its order on the 27th day of January, 1949, denying such petition for rehearing.

—*Chin Gum* v. *United States*, 150 Fed. (2d) 765;
Morse v. *United States*, 270 U. S. 151, 70 L. Ed. 518, 46 Sup. Ct. 241;

Gypsy Oil Co. v. *Escoe*, 275 U. S. 498, 72 L. Ed. 393, 48 Sup. Ct. 112;

United States v. *Seminole Nation*, 299 U. S. 417, 81 L. Ed. 316, 57 Sup. Ct. 283;

National Labor Relations Board v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 82 L. Ed. 1381, 58 Sup. Ct. 904.

3. This case involves a question of construction of Rules 30 and 52(b) of the Federal Rules of Criminal Procedure, which is a question of Federal law, which has not been specifically decided by this Court, in the aspect presented by this case, and should be decided by this Court.

4. The decision of the United States Court of Appeals for the Tenth Circuit in this case insofar as it refused to reverse the judgment in the trial court because of plain error in misdirecting the jury in the discharge of its functions in the trial of the case in the District Court, such plain error adversely affecting substantial rights of this petitioner, on the ground stated in the opinion of the Court of Appeals that such court was unable to say that such error resulted in a miscarriage of justice, was probably in conflict with applicable decisions of this Court.

—*Screws* v. *United States*, 325 U. S. 91, 107, 89 L. Ed. 1495, 65 Sup. Ct. 1031;

Johnson v. *United States*, 318 U. S. 189, 87 L. Ed. 704, 63 Sup. Ct. 549;

United States v. *Atkinson*, 297 U. S. 157, 159, 80 L. Ed. 555, 56 Sup. Ct. 391;

Clyatt v. *United States*, 197 U. S. 207, 221, 49 L. Ed. 726, 25 Sup. Ct. 429;

Brasfield v. *United States*, 272 U. S. 448, 450, 71 L. Ed. 345, 47 Sup. Ct. 135;

United Brotherhood of Carpenters and Joiners of America v. *United States*, 330 U. S. 395, 412, 91 L. Ed. 973, 67 Sup. Ct. 775;

BLEED THROUGH – POOR COPY

Wiborg v. *United States*, 163 U. S. 632, 658, 41 L. Ed. 290, 298, 16 Sup. Ct. 1127, 1197.

5. The case involves a question of the sufficiency of an indictment under the new Federal Rules of Criminal Procedure to charge a violation of Section 2554(a) of Title 26, United States Code, which is a question of Federal law which has not been, but should be, decided by this Court.

6. The decision of the Court of Appeals for the Tenth Circuit in this case, insofar as it refused to reverse the judgment of the District Court because of plain error in the instructions of the court adversely affecting the substantial rights of this petitioner, although such instruction was not excepted to, the liberty of this petitioner being at stake by reason of such error, was in conflict with prior decisions of that court as to the power and duty of an appellate court to reverse the judgment of a trial court in such circumstances.

—*Bogileno* v. *United States*, 38 Fed. (2d) 584;

Strader v. *United States*, 72 Fed. (2d) 589;

Madsen v. *United States*, 165 Fed. (2d) 507.

And was in conflict with other respectable Federal authority.

—*Williams* v. *United States* (C. C. A. 8), 158 Fed. 30, 35, 88 C. C. A. 296;

Meadows v. *United States*, 65 App. D. C. 275, 82 Fed. (2d) 891;

Kinard v. *United States*, 68 App. D. C. 250, 96 Fed. (2d) 522.

III.

STATEMENT OF THE CASE

Reference is made to the statement of the case contained in the petition for writ of certiorari filed herewith and to the facts stated in the opinion of the Court of Appeals, and, in addition thereto, we quote from the record (R. 22) the following portion of the testimony which was given by Government witness, Brown, the paid informer, on cross-examination.

Q. "You talked to Ryles numerous times during the two or three weeks you were here?

A. Yes, sir.

Q. You were with him a good bit?

A. Well, I suspect Cleve and I were together a couple of dozens times, almost every day.

Q. And it was you who insisted on him selling you some dope, wasn't it?

A. Well, yes. I offered to buy some.

Q. He was persuaded by you to sell you some dope, is that right?

A. I don't know whether he was definitely persuaded by me to sell me the dope or not. I want to be fair in answering your question. I did insist on it, yes.

Q. If you hadn't insisted on it he never would have sold you the dope, would he?

A. No, I don't think so.

BLEED THROUGH – POOR COPY

Q. He wasn't trying to sell it, was he?

A. Well, I couldn't truthfully answer that question. I don't know. He didn't approach me and ask to sell it to me.

Q. You did that on both occasions that you were able to obtain these articles from him?

A. Well, yes. Yes, I did.

Q. As far as you know this man never would have committed any offense or done anything against the law if it hadn't been for Mr. Hagstrom and you?

Mr. Summers: I object to that (No ruling).

Q. That is right?

A. I presume it as far as I know. I don't know that he would or would not."

(Mr. Hagstrom, a witness for the Government (R. 6), was the Government narcotic agent who had hired Brown.)

At the conclusion of the Government's evidence, the defendant's counsel made a demurrer and motion as follows (R. 27):

> "Comes now the defendant and demurs to the evidence of the Government as to both counts of the indictment, and moves the court to dismiss the charges, for the reason that the evidence shows that if the defendant committed either offense with which he is charged it was by reason of entrapment by the Government agents."

This was overruled and the defendant excepted (R. 27).

The defendant did not introduce any evidence and moved the court to direct a verdict of not guilty as to both counts, and this motion was overruled (R. 27). Thereupon the case was argued to the jury by counsel for both sides (R. 27).

The court, in its instructions to the jury, gave the following instruction in regard to the issue of entrapment (R. 30):

> "The argument has been made to you, and I think I should give you an instruction in regard to that, that it isn't proper to convict a man upon this kind of evidence by reason of the manner in which it was obtained, or that it isn't fair. I believe the attorney used that argument. That is not a problem for the jury to determine. You are not asked whether or not this defendant ought to be convicted under the circumstances in this case, except as it involves the problem of whether or not the evidence that has been permitted to come to you by the court is such as convinces you beyond a reasonable doubt that he did that with which he is charged. If this evidence is not proper to sustain a verdict of guilty that is the court's problem, not a jury problem. I am telling you now there isn't anything in this case that precludes you from returning a verdict of guilty against this defendant by reason of the manner in which they went about obtaining this evidence. The sole question for you is, does the evidence convince you beyond a reasonable doubt that the defendant made the sale to this witness? If it does you should convict him. If that isn't proper, fair or reasonable I have to look after that, not you. You are the fact finders in this case. Did he make the sale or didn't he make the sale? The law is my problem. You assume your responsibility and I will assume mine, and return your verdict accordingly * * * ."

BLEED THROUGH -- POOR COPY

The evidence showed that the informer, Brown, was actually an agent of the Government (R. 12), that the Government's agents arranged for his release on bond from jail in Tulsa (R. 19), and brought him to Ada, Oklahoma, together with a woman who was not his wife (R. 11), and that he thereafter stayed in a hotel with such woman (R. 11-20), under the surveillance of the Government narcotic agent (R. 11), and that the Government paid him $5.00 a day for his work in ensnaring this defendant (R. 11), which took two or three weeks (R. 25); that Brown was an addict (R. 19), was under a charge in Tulsa of robbery of a doctor of narcotics, on which charge the Government narcotic agents had procured his release on bond (and on which he was serving a sentence in the state penitentiary at the time of the trial) (R. 18), in order for him to operate in this case, and others. Brown's testimony shows that he persuaded Ryles to make the two apparent or alleged sales in this case, and that Ryles would not have done it if it had not been for his persuasion, and would probably not have committed any offense if it had not been for his activities and those of Mr. Hagstrom (R. 22). It can be reasonably inferred from this evidence that petitioner was persuaded and induced by the dope addict, acting as a Government agent, to go procure some morphine for him, in order to relieve his pitiful craving and suffering. It is the petitioner's contention that if the evidence did not conclusively show entrapment, that it did at least raise a jury question which should have been submitted to the jury. The questions presented by the evidence and proceedings at the trial are whether the trial court should have sustained the demurrer to the Government's evidence, which may be considered a motion

for acquittal under Rule 29 of the Federal Rules of Criminal Procedure, and, if not, whether the error of the trial court in misdirecting the jury in regard to the issue of entrapment and deciding the issue against defendant as a matter of law was a plain error affecting the substantial rights of this petitioner, which, under the circumstances in this case, should be noticed under Rule 52(b) of the Federal Rules of Criminal Procedure, although the defendant's counsel failed to specify an exception to the error in the instructions in accordance with Rule 30 of the Federal Rules of Criminal Procedure.

IV.

SPECIFICATIONS OF ERROR

1. The Court of Appeals erred in holding that the error of the trial court in not submitting the issue of entrapment to the jury, and in instructing the jury, as a matter of law, that there was no entrapment in the case was not a plain error for which the judgment of the trial court should be reversed.

2. The Court of Appeals erred in not reversing the judgment of the trial court because of the error of the trial court in misdirecting the jury on the law of the case and in deciding the issue of entrapment against petitioner as a matter of law, when it should have been submitted to the jury as a question of fact.

3. The Court of Appeals erred in holding that the indictment under which petitioner was convicted was sufficient to charge a violation of the statute (26 U. S. C., Sec. 2554 [a]).

BLEED THROUGH – POOR COPY

4. The Court of Appeals erred in not reversing the judgment of the District Court with directions to grant petitioner, the defendant in the District Court, a new trial.

5. The Court of Appeals erred in not holding that the defendant's demurrer to the Government's evidence or motion for acquittal should have been sustained by the District Court.

6. The Court of Appeals erred in denying petitioner's petition for rehearing in that court.

V.

ARGUMENT

First Proposition

The Court of Appeals erred in holding that the error of the trial court in not submitting the issue of entrapment to the jury and in instructing the jury as a matter of law that there was no entrapment in the case was not a plain error for which the judgment of the trial court should be reversed, and erred in not reversing the judgment of the trial court because of the error of the trial court in misdirecting the jury on the law of the case, and in deciding the issue of entrapment against the petitioner as a matter of law, when it should have been submitted to the jury as a question of fact.

This proposition combines Specifications of Error numbered 1, 2, and 4.

If the defendant (petitioner here), was persuaded and induced by the dope addict, Brown, acting as a Government agent, to go procure some morphine for him, and was thereby entrapped, then it is not just that the de-

fendant serve three years on these charges without at least being given the right of having a jury pass on this issue, as such facts do constitute entrapment.

—*Wall* v. *United States* (C. C. A. Fla.), 65 Fed. (2d) 993;

Hunter v. *United States* (C. C. A. Tex.), 62 Fed. (2d) 217;

DiSalvo v. *United States*, 2 Fed. (2d) 222;

Butts v. *United States* (C. C. A. 8), 273 Fed. 35, 18 A. L. R. 143;

Sorrells v. *United States*, 287 U. S. 435, 77 L. Ed. 413, 53 Sup. Ct. 210, 86 A. L. R. 249.

The opinion of the Court of Appeals in this case apparently finds that there was sufficient evidence of entrapment to raise a question for the jury.

The following has been held:

> "It is never permissible for the Government through its officers and agents to initiate the criminal act, nor to entice or induce a defendant to commit a crime, when, without such enticement, or inducement, the defendant would not have committed such crime. A defendant cannot be convicted of a crime which was provoked or induced by a Government agent or officer and which would not otherwise have been committed." (*DiSalvo* v. *U. S.*, 2 Fed. [2d] 222).

The conclusion is apparently reached in the opinion of the Court of Appeals that the trial court did err in giving the instruction to the jury regarding entrapment above quoted and which appears at page 30 of the printed record, but the opinion apparently assumes that although Rule 30 of the Federal Rules of Criminal Procedure is

BLEED THROUGH = POOR COPY

qualified by Rule 52(b) and the two rules are to be construed in *para materia* and do not effect any change in the proper previous decisional rule, yet, that such an error in instructions, as involved here, when not excepted to, in order to be reversible, must be not only a plain error, but one which appears to the Court of Appeals to have resulted in a miscarriage of justice. We have not found where the Court of Appeals for the Tenth Circuit ever previously (prior to the adoption of the Federal Rules of Criminal Procedure), applied such a strict and rigid rule to an attempted attack on an error in an instruction, not excepted to, in a criminal case where the liberty of the complaining party was at stake. The opinion, in this respect, is in conflict with the opinion of that court in the case of *Bogileno* v. *United States*, 38 Fed. (2d) 584, wherein it was held:

> "Where liberty of complaining party is at stake, and court has clearly misdirected jury in discharge of its functions, general rule that appellate court will not consider alleged errors not called to attention of trial court will not be followed, but claimed error *will* be considered notwithstanding charge was not excepted to at time."

In that case the appellant had been sentenced to confinement in the penitentiary for a term of three years, the same as the sentence in this case. The instruction of which petitioner complains in this case appears clearly to be more prejudicial and fundamentally wrong than the instruction considered by the Circuit Court of Appeals for the Tenth Circuit, without exceptions having been made thereto, in the case of *Strader* v. *United States*, 72 Fed. (2d) 589.

It had been held by the Circuit Court of Appeals for the Sixth Circuit [*Marin* v. *United States* (C. C. A. Mich. 1926), 10 Fed. (2d) 271], that alleged errors in the charge of the court to a jury in a criminal case, to which no exceptions were taken, would not be considered on appeal in that court unless it appeared to that court that there had been a miscarriage of justice, but, we submit, this Court had never applied so harsh or rigid a rule against a defendant in a criminal case who sought to obtain a reversal of a judgment and sentence against him because of a plain error in the instructions to the jury, clearly prejudicial to him, such as is presented in the case at bar, and neither had the Circuit Court of Appeals for the Tenth Circuit, prior to the adoption of the new Federal Rules of Criminal Procedure, which the opinion of the Court of Appeals for the Tenth Circuit in this case admits did not change the proper previous decisional rule.

This Court said, in its opinion in the case of *Screws* v. *United States*, 325 U. S. 91, 107, *supra*, a case where no exception was taken to the trial court's charge, that

> " * * * where the error is so fundamental as not to submit to the jury the essential ingredients of the only defense on which the conviction could rest, we think it is necessary to take note of it on our own motion."

We contend that the error in the instructions in this case in the court depriving the defendant of his defense of entrapment was equally as fundamental.

The "plain error" doctrine (which is restated in Rule 52(b) of the Federal Rules of Criminal Procedure), as applied to instructions, was stated by the United States

BLEED THROUGH – POOR COPY

Court of Appeals for the District of Columbia in the case of *Meadows* v. *United States*, 82 Fed. (2d) 881, at page 884, as follows:

> " * * * it is well settled that if a plain error vital to a defendant has been committed, there is power, notwithstanding absence of objection and exception, to notice and correct it on appeal. *Wiborg* v. *United States*, 163 U. S. 632, 658, 16 S. Ct. 1127, 41 L. Ed. 289; *Crawford* v. *United States*, 212 U. S. 183, 194, 29 S. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392; *Mahler* v. *Eby*, 264 U. S. 32, 45, 44 S. Ct. 283, 68 L. Ed. 549; *Brasfield* v. *United States*, 272 U. S. 448, 450, 47 S. Ct. 135, 71 L. Ed. 345. Rule 8 of the Revised Rules of the Supreme Court of the United States (286 U. S. 593, 598, 28 U. S. C. A. following section 354) and Rule IX of the Rules of Practice and Procedure * * * in Criminal Cases * * * , promulgated by the Supreme Court of the United States (292 U. S. 661, 664, 28 U. S. C. A. following section 723a) do not in our view affect this power."

The Circuit Court of Appeals for the Eighth Circuit in the case of *Williams* v. *United States*, 158 Fed. 30, *supra*, at page 35, made a similar statement to the effect that in a criminal case where a plain error is committed in a matter vital to the defendant especially in case where the defendant has been sentenced to confinement, it is the province of the Appellate Court to correct it, citing the cases of:

> —*Wiborg* v. *United States*, 163 U. S. 633, 656, 16 Sup. Ct. 1127, 41 L. Ed. 289, and
>
> *Clyatt* v. *United States*, 197 U. S. 207, 221, 222, 25 Sup. Ct. 429, 49 L. Ed. 726.

And the opinion of the Court of Appeals for the Tenth Circuit in this case is in this respect, it is submitted, actually in conflict with the decision of this Court in the case of *United Brotherhood of Carpenters & Joiners of America* v. *United States*, 330 U. S. 395, 412, *supra*, cited in the opinion of the Court of Appeals. There was no question about the defendant's counsel actually contending to the trial court that the defendant had been entrapped and the purpose of Rule 30 is for the trial court to be informed of any error or omission in instructions so that it may be promptly corrected [*United States* v. *Wilson* (C. C. A. 2), 154 Fed. (2d) 802], and so it is clear from the record in this case that any reason for Rule 30 being given full application is not present in this case.

Second Proposition

The Court of Appeals erred in denying Petitioner's Petition for Rehearing.

(Specification of Error No. 6)

The grounds for the petition for rehearing are shown in the record (R. 39). In his petition for rehearing in that court the petitioner made the same contentions as are presented under the first proposition of the argument in this brief.

PLEASE THROUGH - POOR COPY

Third Proposition

The Court of Appeals erred in holding that the indictment was sufficient.

(Specification of Error No. 3)

Each count of the indictment charged that the alleged sale was "not in pursuance of a written order of the said Darrell Herbert Brown upon a form prescribed and furnished by the *Collector* of Internal Revenue * * * ." Sec. 2554(a) of Title 26, United States Code, makes unlawful any sale of certain drugs "except in pursuance of a written order of a person to whom such article is sold, * * * on a form to be issued in blank for that purpose by the Secretary." It has been held that the Secretary of the Interior has delegated to the Commissioner of Internal Revenue (not Collector of Internal Revenue) the power to issue the blank order forms.

—*Nailling* v. *United States*, 142 Fed. (2d) 551;
Cromer v. *United States*, 142 Fed. (2d) 697.

It was necessary for the statutory exception to be negatived in the indictment.

—*Sutton* v. *United States*, 157 Fed. (2d) 661.

The failure of the indictment to charge an offense may be noticed at any time during the pendency of the proceeding under Rule 12(b)(2) of the Federal Rules of Criminal Procedure.

Fourth Proposition

The Court of Appeals erred in not holding that the Demurrer to the Government's evidence should have been sustained.

(Specification of Error No. 5)

The petitioner contends that Government's own witnesses testified the facts showing that the defendant was entrapped (R. 22), and thereby destroyed the Government's case.

CONCLUSION

It is respectfully submitted that the questions involved in this case are such as to justify this Court in granting a writ of certiorari to the United States Court of Appeals for the Tenth Circuit, in order that its opinion and decision may be reviewed, and that this Court should review the decision of the Court of Appeals for the Tenth Circuit in this case and reverse it.

Respectfully submitted,

JAMES W. BOUNDS,
Hugo, Oklahoma,
Counsel for Petitioner.

Of Counsel:

TURNER M. KING,
CARLOSS WADLINGTON,
Ada, Oklahoma.

BLEED THROUGH – POOR COPY

APPENDIX

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT.

No. 3711—November Term, 1948.

Oliver Cleve Ryles,
Appellant,
v.
United States of America,
Appellee.

Appeal from the United States District Court for the Eastern District of Oklahoma.

[December 29, 1948.]

Carloss Wadlington (Turner M. King was with him on the brief) for Appellant.

Paul Gotcher, Assistant United States Attorney (Cleon A. Summers, United States Attorney was with him on the brief) for Appellee.

Before BRATTON, HUXMAN and MURRAH, Circuit Judges.

MURRAH, Circuit Judge, delivered the opinion of the court.

Appellant was indicted in the United States District Court for the Eastern District of Oklahoma on two counts charging illegal sales of narcotics in violation of 26 USCA 2554(a). Upon trial of the case and at the conclusion of the Government's evidence, the defendant moved for a directed verdict of acquittal on the ground of entrapment. The motion was denied, defendant offered no evidence, and the case was submitted to the jury. The court specifically instructed the jury that the question of entrapment was one of law for the court, and limited their deliberation on the defendant's guilt or innocence to alleged sales. Upon a verdict of guilty, a sentence of three years on each count, to run concurrently, was imposed and the defendant has appealed.

The first ground urged on appeal is that the indictment failed to charge an offense under Section 26 USCA

2554(a). Each count of the indictment alleges that the sales of narcotics was not made in pursuance of a written order upon a form "prescribed and furnished by the Collector of Internal Revenue." The statute condemns all sales of narcotics, except those made in pursuance of a written order on a form "issued in blank for that purpose by the Secretary." While not disputing the power of the Collector of Internal Revenue to act for the Secretary of Treasury, in the issuance of the prescribed forms, the appellant contends that the use of the words "prescribed and furnished" in the allegations of the indictment are not the legal equivalent of the word "issued," used in the statute, and the indictment is therefore at fatal variance with the statute. The indictment stated the substance of the offense and sufficiently apprised the appellant of the nature of the charge against him to permit him to prepare his defense, and it is therefore not defective. See *Hagner* v. *United States*, 285 U. S. 427; *Berger* v. *United States*, 295 U. S. 78; *Denny* v. *United States*, 151 F. 2d 828; *United States* v. *Angelo*, 153 F. 2d 247.

It is next contended that the Government's evidence conclusively establishes entrapment, and the trial court therefore erred in denying the motion for a directed verdict of acquittal. In the alternative appellant says that if entrapment is not conclusively shown, it then became a question of fact for the jury, and the trial court erred in instructing that it was a question of law for the court.

The Government's evidence established the following facts: In the early part of August 1947, a Federal Narcotic Agent arrived in Ada, Oklahoma, with an informer by the name of Darrell Brown, for the purpose of investigating narcotic sales. Brown contacted the appellant, whose name was on a list of suspects, furnished by the Government agent, and during a period of two or three weeks was with him "almost every day." On August 18, the Government agent searched Brown for narcotics, gave him $7.00, ob-

BLEED THROUGH – POOR COPY

served him meet the appellant and return with a purchase of opium. On August 20, under similar circumstances, Brown again contacted the appellant and made a purchase of morphine.

It is well settled that a Government agent may use "decoys" in apprehending law violators, and may offer an opportunity to one who is intending or willing to commit a crime. But, the law will not countenance decoys for the purpose of luring or inducing the innocent or law abiding into the commission of crime. *Sorrels* v. *United States*, 287 U. S. 435; *Butts* v. *United States*, 273 F. 35; *Fiunkin* v. *United States*, 265 F. 1; *Di Salvo* v. *United States*, 2 F. 2d 222; *Vamus* v. *United States*, 13 F. 2d 347; *Polski* v. *United States*, 33 F. 686; *Cratty* v. *United States*, 163 F. 2d 844.

We cannot say as a matter of law from the Government's evidence, that the Government agent enticed or induced the appellant to make the sales of narcotics for which he was convicted and sentenced. At most, it presented a question for the jury under proper instructions on the law of entrapment.

Appellant, represented by competent counsel, did not request any instructions on the law of entrapment. When the trial court failed to so instruct, he neither objected nor suggested any further instructions.

Rule 30 of the Federal Rules of Criminal Procedure, 18 USCA following Section 687, provides for the timely filing of written requests for instructions to the jury, and further provides that "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection."

The rule is but a restatement of decisional law. *Screws* v. *United States*, 325 U. S. 91, 107; *Johnson* v. *United States*,

318 U. S. 189; *United States* v. *Atkinson*, 297 U. S. 157, 159. The decisional rule was subject however, to the qualification that where the error amounted to a denial of fundamental rights the appellate court would notice it upon its own motion. *Screws* v. *United States, supra; Johnson* v. *United States, supra; United States* v. *Atkinson, supra; Miller* v. *United States*, 120 F. 2d 968. Although Rule 30 does not by its terms provide or recognize any exceptions, companion Rule 52b does recognize and restate the decisional exception by providing that "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." See Notes of Advisory Committee on Rules, following Rule 52, 18 USCA following Section 687. The two rules have been construed in *para materia* as preserving the decisional rule. See *Cave* v. *United States*, 159 F. 2d 464, 469; *United States* v. *Monroe*, 164 F. 2d 471, 474; *United States* v. *Perplies*, 165 F. 2d 874. Without adverting to Rule 30, the Supreme Court has recently cited Rule 52b as authority for taking notice of "plain error" in the trial court's instructions, although not assigned or specified. See *United Brotherhood of Carpenters and Joiners of America* v. *United States*, 330 U. S. 395, 412. In our previous consideration of Rule 30 we failed to take into account the modifying effect of Rule 52b. See *Berenbeim* v. *United States*, 164 F. 2d 679; *Bartlett* v. *United States*, 166 F. 2d 920; *Thayer* v. *United States*, 168 F. 2d 247. But, see *Madsen* v. *United States*, 165 F. 2d 507.

Conceding Rule 30, with its qualification, and conceding that the Government's evidence is susceptible to an inference of entrapment justifying submission of that issue to the jury, we are yet unable to say in these circumstances that failure to do so was plain error, resulting in a miscarriage of justice.

Appellant's contention that the evidence is insufficient to support the jury's verdict is wholly without merit.

The judgment is affirmed.

BLEED THROUGH – POOR COPY